statute, is a decision of a federal question, probably in conflict with applicable decisions of this Court. (T. 94, 96)

9. The decision of the Circuit Court of Appeals that the defendant received due process and a fair trial, when in fact: the jury was not a fair sample of the community; the trial was held in part not in the presence of the defendant; the Court prejudged the issue which the jury was to try, and Court and counsel for the government made statements unnecessary to the prosecution or trial of the case, tending to arouse prejudice against the defendant; is in conflict with the general law and applicable decisions of this Court. (T. 94, 99, 100)

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 8244, Walter Ford Gormly, Appellant vs. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; that judgment herein of said United States Circuit Court of Appeals be reversed, and that petitioner have such further relief as may be proper.

Dated this 29th day of July, 1943.

PERRY J. STEARNS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINION OF COURT BELOW

1. The opinion (T. 93-100) in the Circuit Court of Appeals for the Seventh Circuit is reported in Vol. .... F. (2d) ...., and was dated June 9, 1943. As this brief goes to press the opinion has not yet appeared in the advance sheets.

II. JURISDICTION

1. The date of the judgment to be reviewed is February 5, 1943 (T. 41), affirmed by the Circuit Court of

(T. 94, 101)

Appeals June 9, 1943. Motion for rehearing was made June 19, 1943 and was denied July 2, 1943. (T. 101)

2. The statutory provisions which are believed to sustain the jurisdiction of this court are 28 U. S. C. A., Sec. 347, Judicial Code Sec. 240: Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Jan. 31, 1938, c. 14, Sec. 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926, and 28 U. S. C. A., Sec. 377, Judicial Code, Sec. 262, R. S. Sec. 716; March 3, 1911, c. 231, Sec. 262, 36 Stat. 1162.

3. The following facts show that the nature of the case, and the rulings below were such as to bring it within the judicial provisions relied on.

Petitioner was born at Mount Vernon, Iowa, and was 28 years of age on February 7, 1943. (T. 64, 81). He registered under the Selective Training and Service Act of 1940 October 16, 1940, at Milwaukee, Wisconsin. (T. 60, 64). He filled out and returned the questionnaire (Gov. Ex. 2) sent him by Local Board No. 2, and at Series X thereof stated that he was conscientiously opposed to participation in war. (T. 60, 1) Thereafter he filed the special questionnaire for conscientious objectors, Form 47. (Def. Ex. A-1) (T. 71)

In July or August of 1941 the Local Board classified him in Class IV-ELS (T. 60), and on March 28, 1942 reclassified him in Class IV-E. (T. 60) No question of classification is involved in this case.

On June 30, 1942, the Director of Selective Service wrote the State Director for Wisconsin that the Director had taken the liberty of assigning the defendant to the camp for conscientious objectors at Merom, Indiana, to report July 21, 1942 (Defendant's Ex. A-11), and this letter was forwarded to the Local Board July 6, 1942. (Def. Ex. A-10)

On July 13, 1942 the Secretary of the Local Board wrote the State Director acknowledging receipt of the letter above, and stated that the registrant had moved back to Milwaukee, and requested instructions as to whether defendant would be assigned to a conscientious objector camp in the Milwaukee area, or if it was proper to direct him to report to the Board at Aurora, Illinois. (Def. Ex. A-9)

On July 15, 1942, the State Director wrote the Local Board acknowledging receipt of said letter, and suggesting

that no action be taken until advised further by the National Director. (Def. Ex. A-8)

On July 16, 1942, the National Director wrote to the State Director that the registrant, Order No. 3170:

> "is hereby assigned to work of national importance and by order of said Local Board per D. S. S. Form 50 will be delivered to:
>
> Camp Director — Merom Camp
> Merom, Sullivan County, Indiana
> on Aug. 24, 1942." (Def. Ex. A-7)

On August 7, 1942, the State Director wrote the Local Board:

> "The above registrant having been reported to National Headquarters as being in Class IV-E, and with his order number reached, is assigned to Merom Camp, Merom, Indiana, and is to be ordered to report for work of national importance on August 24, 1942, by you. (Def. Ex. A-6)

The record does not show that defendant ever consented to or accepted this or any such assignment.

On August 11, 1942, the Local Board sent to defendant a notice, Form 50, as follows:

August 11, 1942.

ORDER TO REPORT FOR WORK OF NATIONAL IMPORTANCE

The President of the United States,
To Walter Ford Gormly
(First Name) (Middle Name) (Last Name)
Home address 619 North 16th Street, Milwaukee, Wisconsin
Order No. 3170.
Greeting:

Having submitted yourself to a Local Board composed of your neighbors and having been classified under the provision of the Selective Training and Service Act of 1940 as a conscientious objector to both combatant and noncombatant military service (Class IV-E), you have been assigned to work of national importance under civilian direction. You have been assigned to the Merom Camp located at Merom, Indiana, in the State of Indiana.

The Selective Service System will furnish you transportation to the camp, provided you first go to your Local Board named above and obtain the proper instructions and papers.

You will, therefore, report to the Local Board named above at 10:00 A. M., on the 24th day of August, 1942.

You will be examined at the camp for communicable diseases and you will then be instructed as to your duties.

Willful failure to report promptly to this Local Board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940 and may subject you to a fine and imprisonment.

You must keep this form and take it with you when you report to your Local Board.

Louis Davlin, Member of Local Board.

The Local Board did not meet to authorize this so-called order nor vote to issue it. (T. 61, 73) Form 50 above was mailed to registrant because of instructions in defendant's exhibit A-6 above, dated Aug. 7, 1942. It was sent as clerical procedure, signed by a member. (T. 73)

Defendant did not report to Local Board No. 2 on August 24, 1942, (T. 60), but at the hour specified reported to the United States Attorney. (T. 83) He did not report at the Local Board on grounds of conscience. (T. 65)

On August 24th the Local Board sent to defendant a notice, Form 281, reading as follows: (omitting immaterial parts)

> According to information in possession of this Local Board, you have failed to perform the duty, or duties, imposed upon you under the Selective Service law as specified below. * * *
>
> (x) *Did not report to your Board for induction pursuant to Order to Report for Work of National Importance.*
>
> You are therefore directed to report, by mail, telegraph, or in person, at your own expense, to this Local Board, on or before 10 A. M., on the 29th day of August, 1942.
>
> Failure to report on or before the day and hour

specified is an offense punishable by fine or imprisonment, or both.

(Signed) Louis P. Davlin,
Member of Local Board.

(Def. Ex. A-4)

On Aug. 28th the defendant wrote as follows:

Mr. Louis P. Davlin, Local Board No. 2
1126 W. Walnut St., Milwaukee, Wis.

Dear Sir:

I notified your office on June 22 that I could not conscientiously participate in the war effort to the extent of accepting induction into a Civilian Public Service Camp. For that reason I did not report on August 24 as instructed, but reported to the District Attorney's office instead, where I told them of the stand I had taken and gave them my address.

I will not report on August 29 as directed by you in the notice (to Registrant) of Suspected Delinquency.

Yours very truly, Walter F. Gormly.

(Def. Ex. A-3)

Thereafter, the defendant was indicted. (T. 2)

The indictment alleged that it was made at a regular January Term in the year 1942 of the District Court for the Eastern District of Wisconsin, and was endorsed by the clerk "Filed in open court October 1, 1942." (T. 2)

Merom Camp was established by Order No. 14 of the Director of Selective Service dated June 18, 1941, and the order provided:

> "The camp, insofar as camp management is concerned, will be under the direction of approved representatives of the National Service Board for Religious Objectors. Men shall be assigned to and retained in the camp in accordance with the provisions of the Selective Service Act and regulations and orders promulgated thereunder."

(Def. Ex. C (T. 68-69)).

The Court, however, may take judicial notice, Part 691, of the official regulations of Selective Service as the court below did. (T. 70) From these regulations it appears that no provision is made for registrants assigned to said camps to receive compensation; they are required to pay for their own board; they are subject to discipline as in a military

or penal camp, and are not under real civilian direction but are really under military direction and control. As to the work, technical direction is under the Soil Conservation Service of the United States Department of Agriculture. The National Director of Selective Service is Major General Lewis B. Hershey. (T. 76) Administrative and directive control of Civilian Public Service Camps is under the Selective Service System through the Camp Operations Division. (T. 69) The Chief of Camp Operations is Colonel of Field Artillery Lewis F. Kosch. (T. 71, 73) The Selective Service System is military, not civilian. The work done in C. P. S. camps is substantially the same as that in C. C. C. camps (T. 68), for which regulations were issued by the War Department. (T. 68).

The Court may take judicial notice of the fact that Congress has made no appropriation to make any payment of wages to those engaged in work of national importance under Section 5(g) of the Act. The Court may take judicial notice of the contents of the official publication of National Service Board for Religious Objectors offered as Defendant's Exhibit H, but on objection not received in evidence (T. 76). This Board is put in charge of camp management by defendant's exhibit C (p. 69). Camp Merom, at Merom, Indiana, is administered under the agency of the American Friends Service Committee, (pp. 19, 20) of this booklet. (Defendant's proffered Exhibit H). On page 9 of this official publication it is stated:

> Persons who serve under the Civilian Public Service program will receive no pay and in addition either they, or their religious group, will pay for their own maintenance and the general administration of the camps as an expression of their willingness to make sacrifices for the things they believe in.
>
> The Brethren, Quakers, Menonites and Catholics, as administrators of the camps, agreed with the government that they would assume the financial responsibility and that no person would be prohibited from assignment to camp because of inability to contribute to the cost of the program.
>
> * * *
>
> The Administration of the camps is under the direction of the American Friends Service Committee, the Brethren Service Committee, the Mennonite Cen-

tral Committee, the Association of Catholic Conscientious Objectors. Any other agency, or agencies, may be authorized to operate camps. * * *

P. 11:

When local boards are satisfied with the sincerity of a registrant and assign him to Class IV-E (the class for "work of national importance under civilian direction"), his name and address is submitted to the national headquarters of the Selective Service System at the time his order number has been reached.

The name is transmitted by the Selective Service System to the National Service Board for Religious Objectors which mails a questionnaire (Form NSB 101) to the registrant. This form should be completed and returned to 1751 "N" Street N.W., Washington, D. C., immediately as the information contained in the questionnaire is used as a guide in making assignments to Civilian Public Service camps. The National Service Board consults with the administrative agencies on the basis of the information on the questionnaire and then recommends to the Selective Service System the camp location to which the registrant should be assigned.

P. 13

The National Service Board, with offices in Washington, is the official representative of all of the cooperating agencies in dealing with the various branches of the United States Government. It handles complaints, appeal proceedings, establishment of new camps, the inspection service of operating camps, assignment of boys in co-operation with the administrative agencies, and attempts to interpret the position and philosophy of the religious pacifist to the Government and general public.

The National Service Board for Religious Objectors does not function in an administrative capacity. The administration of camps is in the hands of the various agencies represented on the National Service Board.

Existing Administrative Agencies are:

American Friends Service Committee, 20 South Twelfth Street, Philadelphia, Pennsylvania; Paul

J. Furnas, Director of Friends Civilian Public Service.

Association of Catholic Conscientious Objectors, 115 Mott Street, New York, N. Y.; Arthur Sheehan, Director of Catholic Civilian Public Service. Brethren Service Committee, 22 S. State St., Elgin, Ill., Harold Row, Director of Brethren Civilian Public Service.

Mennonite Central Committee, Akron, Pennsylvania; Henry A. Fast, Director of Mennonite Civilian Public Service.

While there is close co-operation between the four administrative agencies, each one is responsible for the administration and financing of its own camps.

The defendant never belonged to the religious organization called the Friends, but is a Methodist. (T. 82)

The court excluded two letters received by the defendant, one dated July 15, 1942 from the Director of Camp No. 14, Merom, Indiana, reading in part as follows: (T. 79)

We have just received word from the National Service Board for Religious Objectors that you will be coming to camp Tuesday, July 21, 1942.

Will you please let us know as soon as possible how you are coming and when and where we may meet you? In general, possibly the best terminal is Sullivan, Ind., a town about 12 miles from camp, where we can pick you up. You might pass this information on to your draft board for whatever use they may care to make of it.

We are situated on the banks of the Wabash River about 30 miles south of Terre Haute. Our work project is supervised by the Soil Conservation Service.

Doubtless you have already received information from the Service Board or the AFSC as to what clothing and other belongings you should bring with you to camp. If you have any further questions, please let us know. Your mail may be forwarded to you at "CPS Camp, Merom, Indiana."

We are enclosing a copy of our camp newspaper, The Plowshare. We're looking forward to seeing you.

Very truly yours,

Claude C. Shotts, Director.

Defendant's Exhibit M, a letter from the Director of Camp No. 14, dated February 3, 1943, was excluded. In this letter the Director answered some questions of petitioner. The letter reads in part as follows: (T. 80)

> The approximate cost of operating the CPS system is somewhere in the vicinity of $35 per month per man. If a man is able and willing to assume all or any part of his share of the expense in camp he is encouraged to do so. However, this matter of expense has nothing to do with the assignment or the acceptance of any man with a 4E classification. The entire CPS system is supported, or rather, underwritten by the various religious agencies and is financed through contributions from interested people. *The only compensation received by the men in CPS camps is a $2.50 per month allowance* for use in purchasing articles such as soap, razor blades, etc. Incidentally, I understand that some camps do not make it a general practice to give this allowance unless it is specifically needed. However, all of our Friend's camps still give the allowance. (Emphasis ours)

4. The cases believed to sustain said jurisdiction are as follows:

Lau Ow Bew vs. U. S., 144 U. S. 47; 125 S. C. 517.
U. S. vs. Gulf Refining Co., 268 U. S. 542; 45 S. C. 597, 598.
Holiday vs. Johnston, 313 U. S. 342, 550; 61 S. C. 1015, 1017.
Bowles vs. U. S., 318 U. S., 319 U. S., 63 S. C. 758, 912, 1323; 87 L. Ed.
U. S. vs. Johnson, decided June 7, 1943, 63 S. C. 1233.
Schneiderman vs. U. S., decided June 21, 1943; 63 S. C. 1333.
Bartchy vs. U. S., decided June 7, 1943, 63 S. C. 1206.
Falbo vs. U. S., Cert. granted June 21, 1943, 63 S. C. 1448.

III. STATEMENT OF THE CASE

The facts have already been stated in the preceding petition and they are hereby adopted and made a part

of this brief, as stated under I thereof and II(3) hereof (ante pp. 1, 2, 5-12).

IV. SPECIFICATION OF ERROR

1. The Court erred in holding that the powers of the Grand Jury had not expired prior to the indictment in this case. (T. 94, 96)

2. The Court erred in holding that the Local Board could issue an order without a meeting or vote, and that the issuance of the alleged order in question was purely ministerial. (T. 96-9)

3. The Court erred in holding that the assignment and order to report to Civilian Public Service Camp did not constitute involuntary servitude, and in holding that such internment and servitude may be imposed as a condition of exemption from military service. (T. 94-96)

4. The Court erred in holding that the Act in question does not establish religion and prohibit the free exercise thereof contrary to the Constitution. (T. 94, 96)

5. The Court erred in holding that Congress could delegate legislative and judicial powers to Director of Selective Service, Local Boards, and the National Service Board for Religious Objectors, and that the powers now attempted to be exercised over this defendant were not in excess of the powers delegated. (T. 94, 96)

6. The Circuit Court of Appeals erred in holding that the defendant received a fair and impartial trial in the United States District Court for the Eastern District of Wisconsin. (T. 94, 99, 100)

7. The Court erred in holding that the indictment need not negative the statutory exception. (T. 94, 96)

8. The Court erred in not holding the indictment void because vague and based on conclusions of the draftsman. (T. 94, 96)

9. The Court erred in holding that the denial of right of counsel by the Selective Service System is due process. (T. 94, 96)

10. The Court erred in holding that the jury was a fair sample of the community and fairly chosen. (T. 94, 96)

11. The Court erred in holding that the questionnaires compelled to be answered by defendant were not unreasonable searches which could not be used as evidence to convict the defendant. (T. 94, 96)

12. The Court erred in holding that the so-called order

to report was in form and fact an order within the meaning of the indictment. (T. 94 96-9)

13. The Court erred in not holding that the so-called order to report was superseded by a later order with which defendant in form complied. (T. 94, 6)

14. The Court erred in holding that an indictment basing a criminal charge upon a refusal to work under civilian direction is valid. (T. 94. 6)

15. The Court erred in holding that the order of the Draft Board is final and that the Court and jury could not inquire into its validity. (T. 94, 96)

16. The Circuit Court of Appeals erred in holding that the evidence was clear, beyond a reasonable doubt, that the defendant wilfully violated, and wilfully and unlawfully failed, neglected and refused to perform a duty of carrying out a direction given under the Selective Training and Service Act of 1940, as amended, and in effect so instructing the jury. (T. 94, 96)

17. The Court erred in holding the law and the evidence sufficient to support petitioner's conviction under Sec. 11 of the Selective Training and Service Act of 1940, and the regulations made thereunder, for knowingly and unlawfully failing, neglecting and refusing to carry out a direction claimed to have been issued by his Local Board to report to said Local Board for work of national importance as a conscientious objector. (T. 94, 96)

V. MATERIAL PORTIONS OF ACT AND REGULATIONS

Material Portions of the Selective Training and Service Act of 1940 are as follows:

Sec. 5 (g).

Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act,

be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. * * *

Sec. 10. Rules and regulations; Selective Service System.

(a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decision of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe. Appeal boards and agencies of appeal within the Selective Service System shall be composed of civilians who are citizens of the United States. * * *

On October 4, 1940, the President prescribed regulations for classification and selection and designated Lt. Col. Lewis B. Hershey to perform said duties under the act. On October 22, 1940, the President prescribed regulations for delivery and induction. On February 6, 1941, the President authorized the Director of Selective Service to establish work of national importance under civilian direction for persons conscientiously opposed to war, and on the same day prescribed camp regulations. On April 11, 1941, the President authorized the establishment of work of national importance for those opposed to war. On September 3, 1941, the regulations on classification and selection were revised.

The regulations provide among other things, at the section numbers shown below, as follows:

603.56 Organization and meetings.

The board shall elect a chairman and a secretary. A majority of the board shall constitute a quorum for the transaction of business. A majority of those present at any meeting shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification. * * *

603.59 Signing official papers.

Official papers issued by a local board may be signed by the clerk "by direction of the local board" if he is authorized to do so by a resolution duly adopted by and entered in the minutes of such local board, provided that the chairman or a member of a local board must sign a particular paper when specifically required to do so by the provisions of a regulation or by an instruction issued by the Director of Selective Service.

622.51 Class IV-E: Available for work of national importance; conscientious objector.

(a) In Class IV-E shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service. * * *

625.2 Appearance before local board.

* * * If the registrant does not speak English adequately, he may appear with a person to act as inter-

preter for him. No registrant may be represented before the local board by an attorney.

652.1 Report of conscientious objector to Director of Selective Service.

(a) When a registrant in Class IV-E has been found to be acceptable for work of national importance under civilian direction, the local board shall immediately notify the Director of Selective Service on a Conscientious Objector Report (Form 48) that the registrant is so acceptable and is available for assignment to work of national importance under civilian direction. * * *

(c) Until such time as his defects have been corrected, no Conscientious Objector Report (Form 48) shall be filled out or used for a registrant who, according to the report of the examining physician, will be qualified for general service after satisfactory correction of specified remediable defects.

652.2 Assignment by Director of Selective Service.

(a) The Director of Selective Service, upon receipt of (1) the Conscientious Objector Report (Form 48) for a registrant * * * shall assign the registrant to a camp.

652.11 Preparation and distribution of Order to Report; delinquent of IV-E registrants.

(a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in Class IV-E: Mail the original of the Order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with the Armed Forces' Original, the Surgeon General's Copy, and the National Headquarters' Copy of the registrant's Report of Physical Examination and Induction (Form 221), to the camp directors, and retain the Local Board's Copy of the registrant's Report of Physical Examination and Induction (Form 221) in the registrant's Cover Sheet (Form 53). * * *

When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law.

653.1 Work projects.

(a) The Director of Selective Service is authorized to establish, designate, or determine work of national importance under civilian direction. He may establish, designate, or determine, by an appropriate order, projects which he deems to be work of national importance. Such projects will be identified by number and may be referred to as "civilian public service camps."

(b) Each work project will be under the civilian direction of the United States Department of Agriculture, United States Department of the Interior, or such other Federal, State, or local governmental or private agency as may be designated by the Director of Selective Service. Each such agency will hereinafter be referred to as the "technical agency."

(c) The responsibility and authority for supervision and control over all work projects is vested in the Director of Selective Service.

653.2 Camps.

(a) The Director of Selective Service may arrange for the establishment of a camp at any project designated as work of national importance under civilian direction.

(b) Government-operated camps may be established in which the work of national importance and camp operations will both be under the civilian direction of a Federal technical agency using funds provided by the Selective Service System and operating under such camp rules as may be prescribed by the Director of Selective Service.

(c) The Director of Selective Service may authorize the National Service Board for Religious Objectors, a voluntary unincorporated association of religious organizations, to operate camps. The work project for assignees of such camps will be under the civilian direction of a technical agency. Such camps and work projects shall be operated under such camp rules as may be prescribed by the Director of Selective Service.

653.3

(d) When the National Service Board for Religious Objectors has been authorized to operate a camp, it shall assume the entire financial responsibility for the wages of the camp director and other employees, the clothing, feeding, housing, medical care, hospitalization, welfare, and recreation of assignees and all other costs of operating the camp. * * *

653.12 Duties.

Assignees will remain in camp until released by proper authority; perform their assigned duties promptly and efficiently; keep their persons, clothing, equipment, and quarters neat and clean; conserve and protect Government property; conduct themselves both in and outside of the camp so as to bring no discredit to the individual or the organization; and comply with such camp rules as may be prescribed from time to time by the Director of Selective Service.

653.14 Final release.

(a) Each assignee who completes his period of active participation in work of national importance under civilian direction shall receive a Certificate of Release from Active Participation in Work of National Importance under Civilian Direction (Form 45). * * *

(b) Each such assignee after the completion of his period of service shall be transferred to a reserve until he attains the age of 45, or until the expiration of 10 years after he is transferred to such reserve, or until he is discharged from such reserve, whichever shall occur first, and shall, during such period, be deemed to be a member of such reserve and shall be subject to such additional participation in work of national importance under civilian direction as may now or hereafter be prescribed by law. Such assignee will be retained in Class IV-E by the local board.

691.1 Camp responsibility.

The National Service Board for Religious Objectors will appoint the camp director. The camp director will be responsible for all phases of camp operations, including maintenance of the camp and its environs and watchman service in accordance with standards acceptable to the technical agency directing the work project. He shall also be responsible for the reception, feeding, housing, clothing, recreation, education, health, and camp life of the assignees.

691.14 Welfare and recreation.

The Welfare and recreation of assignees is the direct responsibility of the camp director. * * *

691.15 Education.

The educational program for assignees will be the responsibility of the camp director. He may avail himself of such volunteer services as may be provided by members of the technical agency staff attached to the camp. On-the-job training will be a definite responsibility of the project superintendent of the technical agency.

691.16 Furloughs and liberty.

(a) The camp director, with the concurrence of the project superintendent of the technical agency, may grant furloughs to an assignee at such times as he may be spared from his duties. No assignee may receive a furlough or furloughs in excess of a total of 30 days in any one year, including furloughs for special religious holidays and periods of convalescence following illness or injury. Such furloughs shall include week ends and holidays falling within the period of furlough. The camp director may temporarily restrict or suspend the granting of furloughs to any or all men assigned to a project whenever in his opinion circumstances render such restrictions or suspensions desirable. The number of assignees on furlough at any one time will in no event exceed 15 percent of the total number of assignees in such camps.

(b) Liberty or leave regulations covering the hours outside of work hours may be issued from time to time by the camp director who may prescribe hours assignees may be away from the camp and how far they may go from camp. Week-end leave must be confined between noon on Saturday and 6 A.M., Monday. A sufficient number of assignees will be maintained at the camp to provide for watchman service and fire protection at all times.

691.17 Discipline.

(a) An assignee who fails to perform the duties outlined in section 653.42 or whose conduct amounts to a violation of local, State, or Federal criminal statutes, or to violation of the rules and regulations herein set forth, will be subject to such fines, restriction of privileges, extra duty, additional service, reclassification under the Selective Service Regulations, or prosecution under the Selective Training and Service Act of 1940, as amended, as the case may warrant. * * *

(d) If, after reporting to the camp, an assignee is absent without leave for a continuous period of 10 days, he will be deemed to be a deserter. On the 11th day the Director of Selective Service will be notified through regular channels and may take the necessary steps to report the assignee to the proper United States attorney as a violator of the Selective Training and Service Act of 1940, as amended.

(e) Refusal to work or perform other assigned duties, inciting others to refuse to work or perform assigned duties, or failure to abide by the rules and regulations promulgated by the camp director, will constitute a violation of these rules and regulations.

A full and immediate report of such violation of these rules and regulations will be made to the Director of Selective Service through regular channels. If the reported conduct indicates that the assignee may have been improperly classified, the Director of Selective Service may take the necessary steps to submit the information to the assignee's local board with a request that the assignee's case be reopened and his classification considered anew under the Selective Service Regulations. The Director of Selective Service may also report the assignee to the proper United States attorney as a violator of the Selective Training and Service Act of 1940, as amended.

(f) Loss of time over 24 hours because of the assignee's absence without leave, sickness or injury due to his own misconduct, confinement by civil authorities following conviction, or willful failure to perform duties, must be made up; provided that no assignee may be retained in camp longer than his maximum period of service as prescribed by law.

(g) The camp director may make and enforce such rules as he may deem appropriate for the operation of his camp and the carrying out of these regulations, and he has wide latitude in imposing such disciplinary action as he may deem necessary. * * *

691.22 Hours of work.

The hours of work on the project will be determined by the technical agency. No limitation is set on the number of hours that an assignee may be required to work in any given day or week. Forty-four hours per week shall be the minimum that any assignee shall work. Travel time

shall not be included in computing the 44-hour minimum, except the portion thereof which exceeds 1 hour in any one day. In case the camp director of a camp does not agree as to the hours of work on the project, all facts in the case will be reported through the National Service Board for Religious Objectors to the Director of Selective Service for final decision. Assignees will be subject to emergency calls by the project superintendent of the technical agency on any day or night at any hour for the purpose of fighting forest fires or other emergencies affecting life or property.

VI. OPINION IN U. S. vs. MROZ

The opinion below (p. 3) (T. 96) refers to its opinion in *U. S. vs. Mroz*, decided June 3, 1943. We set out the opinion below, so far as material to the present case. Before Evans, Sparks and Major, Circuit Judges.

EVANS, *Circuit Judge.* This appeal involves a conviction for violation (Sec. 311 of 50 U. S. C. A.) of an order of a local (Milwaukee) draft board to defendant to report for transportation "for work of national importance, as a conscientious objector," which order was issued under authority of the Selective Service Act. (50 U. S. C. A. Sec. 301.) * * *

The oral argument of counsel at the hearing before this court was vehement in deriding the Selective Service Act and its administration. He contended, among other things, that military service constituted slavery and involuntary servitude in violation of the Thirteenth Amendment to the Constitution. To a greater degree, he argued, was the Selective Service Act violative of Amendment XIII and more clearly constituted involuntary servitude when applied to "a minister" who had conscientious objections to war, yet was sent to a camp *without pay.*

Expiration of Term of Court. Defendant argues that the term of court at which the grand jury was called had closed before the indictment in question was returned. In other words, the authority of the grand jury to act ceased before it voted the indictment against defendant.

The appellant relies on this court's decision in *U. S. vs. Johnson*, 123 F. 2d 111. While this case is still pending in the U. S. Supreme Court, it is readily, in point of fact,

distinguishable from the case before us. It may therefore be dismissed without a consideration of its holding.

Counsel's argument is predicated upon the assumption that the statutory January Term, 28 U. S. C. A. Sec. 195, of court at Milwaukee terminated because the statutory terms of court at Oshkosh and Green Bay, begin in June and April, respectively, and since there is but one judge to hold all three courts and he can be in but one place at a time, the term of court at one place must *ex necessitae* close in order that the term at the next designated place may begin.

This argument has been before several courts and rejected by all. In 1910, the Supreme Court said, in *Harlan vs. McGourin,* 218 U. S. 442,

> "We think the purpose of the law was to provide for statutory terms of court for the Northern District of Florida, beginning on the first Monday of February and March respectively, which term should continue until the beginning of the next term, *unless finally adjourned in the meantime.* Such is the general and recognized practice in the Circuit Courts of the United States. * * *
>
> *"There was certainly no adjournment of the court for the term when the judge was absent holding court at Tallahassee,* or was out of the state." (Italics ours.)

In *U. S. vs. Perlstein,* 39 F. Supp. 965, Judge Maris stated:

> "The conclusion has uniformly been reached that unless sooner adjourned *sine die* a stated term of court regularly opened at a time and place fixed by statute continues until the time fixed by law for the convening of the next term at the same place even though a term has commenced in the meantime at another place in the district. (citing cases.)" (This case was affirmed without passing on this point in 126 F. 2d. 789, certiorari denied, 316 U. S. 678.)

And in *U. S. vs. Rasmussen,* 95 F. 2d. 842 (C. C. A. 10), the court said:

> "A term of court does not automatically expire until the time fixed by law for the convening of the next term *at that place* unless an order is entered expressly adjourning it sooner, even though terms may begin at other places in the meantime." (Italics ours.)

The distinction which appellant attempts to make as to these and other cases, *Bronson vs. Schulten,* 104 U. S. 415; *East Tenn. Iron Co. vs. Wiggin,* 68 F. 446; *Petn. of Thomas Towboat Co.,* 23 F. 2d. 493; *Denver Livestock Co. vs. Lee,* 18 F. 2d. 11, 13; *Florida vs. Charlotte Harbor Co.,* 70 F. 883, namely, that there may have been a plurality of judges in such districts whereas in Wisconsin there is but one judge in the district, is unimportant, when it comes to construing the statutorily designated terms, having a specific commencement but no fixed termination. The aim of the statute was to provide a definite time for judicial service in each community having need of it, not to automatically terminate by inference a term expressly and specifically created by the same statute.

On the merits of this appeal a mere listing of appellant's grounds for reversal suggests triviality of merits. (*Arver vs. U. S.* (Selective Draft Law Cases), 245 U. S. 366; *Goldman vs. U. S.,* 245 U. S. 474; *Cox vs. Wood,* 247 U. S. 3; *Ruthenberg vs. U. S.,* 245 U. S. 480; *U. S. vs. Macintosh,* 283 U. S. 605; *U. S. vs. Williams,* 302 U. S. 46; *Hamilton vs. Regents,* 293 U. S. 245). It must be borne in mind that the charge upon which the criminal sentence was imposed was a failure to obey an order of his local draft board for transportation to a conscientious objectors' camp. That appellant received the order, is conceded; that he intentionally disobeyed the order is clear. The Board issued its order only after it had been directed so to do, following an appeal of his case by appellant.

We cannot ignore the seriousness of the issues which defendant presents. His challenge, if successful, would jeopardize the country's defense in time of war. That may have been defendant's object, or his action may have resulted from an over exaltation of self and minimization of the obligation of a citizen to society. Whatever his mental reaction to a war status may have been, the result is the same. Defiance of the authority and a resulting expression of duty and obligation of citizen to his government.

That such expression of government and of citizen duty may be old and well recognized among nearly all good citizens of the land seemingly counts for little with those who write in large letters the duty of government to preserve itself and protect its citizens in time of war, but to exact nothing from citizens whose personal interest or

convictions are not in accord with the government's adopted policy. * * *

Appellant's clear and unqualified duty was to comply with his draft board's order. He cannot "take the law into his own hands" and render himself invulnerable to consequencies. The draft machinery has been legally (50 U. S. C. A. Sec. 301, et seq.) set up, and it is not for the individual to constitute himself judge of his own case.

Other circuits have dealt with similar questions. Judge Parker of the Fourth Circuit dealt with a similar case in *Barley vs. U. S.*, decided April 8, 1943.

In the margin are set forth additional quotations of pertinent authorities. (*U. S. vs. Kauten*, 133 F. 2d. 703 (CCA 2); *Selle vs. U. S.*, 133 F. 2d. 1015 (CCA 8). *U. S. vs. Grieme*, 128 F. 2d 811 (CCA 3); *Rase vs. U. S.*, 129 F. 2d. 204 (CCA 6); See also *Buttecali vs. U. S.*, 130 F. 2d. 172 (CCA 5); *Goff vs. U. S.*, decided May 4, 1943 (CCA 4); *Honaker vs. U. S.*, decided same day by the same circuit; *Johnson vs. U. S.*, 126 F. 2d. 242; *Fletcher vs. U. S.*, 129 Fed. 2d. 262.)

The Act itself (50 U. S. C. A. Sec. 310 (a) (2)) provides:

> "The decision of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

Appellant dwells on lack of a due process hearing, and on arbitrary and capricious action. He seemingly fails to realize that war is realistic, that the emergency requires immediate mobilization of a large manpower; that each case must be handled individually yet speedily. The Act provides for the administrative set up to handle this titanic task expeditiously. Each individual answers his questionnaire, and can supplement it with any other evidence he wishes to present in support of his claimed exemption. If the Board's ruling be adverse to him, he may appeal, as appellant did, and the Regulations provide for a reference in the case of conscientious objectors. Such a reference was had, and an extended hearing took place in which appellant participated.

It was determined by that referee and by the Appeals Board, unanimously, that appellant should be classed as a conscientious objector but not as a duly ordained minister. The authorized administrative machinery passed upon

this man's case individually and concluded he was not a minister within the meaning of the Act, but, since he was opposed to combatant and non-combatant service, he should be considered a conscientious objector. He received all the consideration the emergency of the situation permitted, and the administrative tribunals' decisions have placed him in a category where his valued life is safer than that of many of his fellow citizens.

We are confident (at least we are hopeful) that mature reflection will cause a modification of counsel's opinion of the Selective Service Act and its administration. It is hard to conceive of any government at war dealing more considerately with its citizens who express conscientious objections to war, and especially so, where the citizen for the first time voiced such sentiment and claimed to be a full-fledged minister after war was declared, and he had been called by the draft.

Judgment is Affirmed.

VII. ARGUMENT

SUMMARY OF ARGUMENT

A. The Circuit Court of Appeals decides federal questions in a way probably in conflict with applicable decisions of this court.

Point 1. An unconstitutional condition cannot be imposed as the price of a privilege.

Point 2. By the Act, Congress unlawfully delegates its powers and the President and the Director of Selective Service have exceeded the powers delegated.

Point 3. Act unconstitutionally delegates judicial powers to an administrative body.

Point 4. Indictment lacks definiteness, and it and the subsequent proceedings below are void because the Act does not set up an ascertainable standard of guilt.

Point 5. Indictment and all subsequent proceedings below are void because the indictment does not negative the statutory proviso.

Point 6. Failure of defendant to report was not wilful.

Point 7. Provision in the regulations that no registrant may be represented by counsel is lack of due process.

Point 8. Indictment was returned too late and is void.

B. The Circuit Court of Appeals decides an important question of general law in conflict with the weight of authority.

Point 9. So-called order signed by one member, without action or vote of the Board is illegal and the indictment and subsequent proceedings below founded thereon are void.

Point 10. Alleged order is void because it violates petitioner's rights under the First Amendment.

Point 11. Defendant did not receive due process and fair trial as required by Constitution and law of the land.

C. The decision of the Circuit Court of Appeals is at variance with decisions of another circuit.

Point 12. Ruling that an order of a Local Board may not be questioned as to its validity is not good law and conflicts with *Johnson vs. U. S.*, 126 F. (2d) 242, *Rase vs. U. S.*, 129 F. (2d) 204, and *Baxley vs. U. S.*, 134 F. (2d) 998, 999.

A. The Circuit Court of Appeals decides federal questions in a way probably in conflict with applicable decisions of this court.

1. *An unconstitutional condition cannot be imposed as the price of a privilege.*

By Sec. 5(g) of the Selective Training and Service Act of 1940, it is provided that nothing therein shall be construed to require any person to be subject to training and service who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form, and that any person claiming exemption because of such objections shall be assigned to work of national importance under civilian direction.

The regulations, at Sec. 652.2, provide that the Director of Selective Service shall assign the conscientious objector to a camp; at Sec. 653.12, that a person so assigned shall remain in camp until released; and at Sec. 653.14(b), when released shall be transferred to a reserve for 10 years, or until he attains 45 years of age, or until he is discharged, whichever occurs first, and shall be subject to such additional participation in work of national importance as may now or hereafter be prescribed by law. By regulation (Sec. 691.1) it appears that defendant is to be sent to a camp in charge of a Camp Director appointed by the National Service Board for Religious Objectors; that his welfare and

education are to be supervised (Sec. 691.14-5); that he is to have only such freedom as the Camp Director may allow, such as furloughs, liberty and leaves (Sec. 691.16); that prolonged absence from camp make him a deserter and that he is subject to "such disciplinary action" as the Camp Director may "deem necessary" (Sec. 691.17).

By Sec. 691.22 hours of work are provided to be fixed by the technical agency without consulting defendant, as assignee, and no limitation is set upon the number of hours that an assignee may be required to work, except the minimum of 44 hours. In case the Camp Director objects to the hours of work the facts are to be reported to the Director of Selective Service for final decision. As shown by Defendant's proffered Exhibit M, the only compensation received by men in Civilian Public Service Camps is $2.50 a month allowance for incidentals, not as compensation.

The Court will take judicial notice that no real monetary compensation is paid to assignees in Civilian Public Service Camps, and that they are required to pay their own board, unless it is furnished to them by some charitable organization, and that their earnings, if any, are not paid to them, but are transferred to the general funds of the United States.

The record sufficiently shows that defendant, if assigned to such camp, would be subjected to involuntary servitude for the duration of the war and for such longer period as is envisaged by Reg. 653.14(b).

Amendment XIII to the Constitution of the United States provides that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." This amendment has been held to be self-executing. As defendant was to be sent to Merom in the State of Indiana his proposed servitude was to be within the United States. The "work" for which the defendant was required to report by the order in question is involuntary servitude within the amendment. It has all the indicia of the most flagrant sort: 1. Assignment to labor by an order to which defendant did not consent; 2. Place of employment fixed without consent of defendant; 3. Hours of labor fixed without his consent; 4. A sophistical limitation on the hours of labor; 5. No freedom outside of working hours except by permission of some overseer; 6. Subjection to disciplinary action

at whim or discretion of Camp Director; 7. Inability, voluntarily, to quit or change job; 8. Imprisonment in a camp; and 9. No compensation.

The work in question is involuntary servitude within the meaning of the following cases:

Ex Parte Wilson, 114 U. S. 417; 5 S. C. 935; 941; 29 L. Ed. 89.

Slaughter House Cases, 83 U. S. 36; 16 Wall. 36; 21 L. Ed. 394.

Hodges vs. U. S., 203 U. S. 1, 17; 27 S. C. 6, 8; 51 L. Ed. 65.

Taylor vs. Georgia, 315 U. S. 25; 62 S. C. 415, 417.

Involuntary servitude is defined in *Black's Law Dictionary* as "the condition of one who is compelled by force, coercion, or imprisonment and against his will to labor for another whether he is paid or not."

The servitude involved in Civilian Public Service Camps is not like jury duty, road building and similar services sometimes required of a citizen, in that such duties are paid for either in cash or by release of taxes, and do not take the entire time of the person involved, and are subject to release for (and often without) cause, and do not interfere with the subject's "regular business." Services in the Army or militia are also distinguishable and have been justified on the ground of the power of the federal government to raise armies.

Arver vs. U. S. 245 U. S. 366; 38 S. C. 159.

Such action was previously justified on the ground that the person called to military duty could furnish a substitute.

Booth vs. Woodbury, 1864, 32 Conn. 118.

In this manner, persons upon whom the draft might fall with particular severity could equalize his burden by furnishing a substitute. The present act expressly forbids such relief.

The *Arver case, supra*, was dismissed with the statement that the objection would seem to be too frivolous for further notice, thus raising doubt as to rationale and justice of the opinion. However erroneous we may regard that decision to be, this case is not governed by the *Arver case*, and is distinguishable because the involuntary servitude here involved is not necessary to or for the purpose of raising armies. It has long been recognized that the exer-

cise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the Federal Constitution.

U. S. vs. C. M. ST. P. & P. R. R. CO., 282 U. S. 311, 328, 329; 51 S. C. 159.

FROST & FROST TRUCKING COMMISSION vs. RAILROAD COMMISSION, 271 U. S. 583, 93-9; 46 S. C. 605; 70 L. Ed. 1101; 47 A. L. R. 457.

HANOVER INS. CO. vs. HARDING, 272 U. S. 494, 507, 8; 47 S. C. 179; 71 L. Ed. 372; 49 A. L. R. 713.

Western Union Telegraph Co. vs. Kansas, 216 U. S. 1, 47, 48; 30 S. C. 190; 54 L. Ed. 355.

Western Union Telegraph Co. vs. Foster, 247 U. S. 105, 114; 38 S. C. 438; 62 L. Ed. 1006; 1 A. L. R. 1278.

As the court says in the first case cited, the grantee may ignore the enforcement of the condition without losing the grant. (282 U. S. 311, 328). Such being the case, and the grantee of the exemption having the right to ignore the condition, such right is an absolute defense to criminal prosecution.

This issue was raised throughout the trial by the demurrer and motion to quash, paragraph 2 and 3 (T. 17); by the plea in abatement, paragraphs 3, 4, 9, (T. 23, 25); plea in bar, paragraph (h) (T. 28); requested instructions, paragraphs 12, 13, 14, 15, 16, 17 (T. 32); argument to the jury (T. 86); assignment of errors, paragraphs 39, 40, 41, 42, 43, 44, and 46. The court below, in the second paragraph of the opinion at point 3, notes that defendant claims the judgment should be reversed on this ground, and says: (T.

> "Other grounds are advanced which we do not specifically state or discuss as they are clearly without merit."

In the third paragraph of p. 3 the Court says this point (T. 3 (and 4 others) were sufficiently treated in U. S. vs. Mroz, decided by it June 3, 1943, set forth above. In fact the point was not there treated at all.

In the ninth paragraph of the opinion (second quoted (p. herein) the court below says that counsel "was vehement in deriding the Selective Service Act and its administra-

tion." As a matter of personal privilege we here deny this statement. Counsel has at no time ridiculed the Act, the Regulations, or the Selective Service System. Counsel has at all times earnestly and seriously attacked the constitutionality of the Act and Regulations here involved, and the validity of the powers attempted to be exercised by the administrative agencies thereunder. Counsel has not contended "that military service constituted slavery and involuntary servitude," but only that involuntary induction may be.

With this unfavorable introduction of the issue into its opinion the Court fails to discuss or reason, and so far as we discover does not treat the issue at all.

The Court discusses one or two grounds of error raised, and says, (p. 6): (T. 99)

> "Other contentions made by counsel for defendant have been considered and all are objected ~~to~~. We are referring to only one to illustrate how void of merit they are."

At no point in the opinion is the issue so seriously and earnestly raised discussed by the court. Issues involving the liberty of an American citizen are not thus lightly to be brushed aside.

2. *By Act, Congress Unlawfully Delegates its Powers and President and Director of Selective Service Have Exceeded Powers Delegated.*

The Act provides that in lieu of induction a conscientious objector may be assigned to work of national importance, and the President is authorized to prescribe rules and regulations to carry out the Act.

In *Field vs. Clark*, 143 U. S. 649; 12 S. C. 495; 36 L. Ed. 294, cited in the *Arver case, supra*, the court said (p. 504):

> That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.

In that case it was found that there was nothing involving expediency or the just operation of legislation left to the President, and that direction (p. 505) "to make law is distinguishable from that of execution." Whether an act unlawfully delegates legislative power or the exercise of the delegated power exceeds that conferred, must depend

upon the facts of each particular case. The violation, if any, cannot be affirmed or denied merely on the citation of other cases, as was done in the *Arver case*. While the Act provided that a conscientious objector might, in lieu of induction, be assigned to work of national importance under civilian direction, the standards set up by the Act are insufficient to constitute a framework within which the executive branch of the government can operate. It is not clear how Congress, limited in its power to the raising of armies, can delegate to the President the power to induct for work other than army work. The Act clearly exempts the conscientious objector from the army, the limit of Congressional power. The Act does not set up any standard for determining what is work of national importance, nor what is civilian direction.

Upon this narrow and uncertain basis the President and the Director of Selective Service, through the Regulations, orders and "directives" have legislated a system whereby conscientious objectors have their exemption converted to a penalty are torn from their places of residence and placed in camps without a word in the Act to indicate that such was the intent of Congress. If the Act can be interpreted as authorizing such imperious regulations, it delegates powers of a most devastating nature and must be held beyond the power of Congress to enact.

3. *Act Unconstitutionally Delegates Judicial Powers to an Administrative Body.*

In *Arver vs. U. S.*, 245 U. S. 366; 38 S. C. 159, 165, the Court cites several decisions as if by authority the claim of illegal delegation of judicial power could be disposed of. In fact, each such claim of delegation must be considered on its own merits, and cannot be disposed of by mere citation of authority of other cases which were held not to involve unconstitutional delegation.

In *Wong Wing vs. U. S.*, 163 U. S. 228; 16 S. C. 977, it was admitted Congress might prevent aliens from coming into the country, but held that the provisions of the Congressional Act that Chinese persons, summarily, and without judicial trial, convicted of unlawful entry should be imprisoned at hard labor for not more than one year and thereafter removed from the United States, inflicted an infamous punishment contrary to the Fifth and Sixth Amendments to the Constitution. The Court conceded that

some detention or temporary confinement might be necessary to give effect to the exclusion or expulsion of aliens, and said (p. 980):

> But the evident meaning of the section in question * * * is that the detention provided for is an imprisonment at hard labor, which is to be undergone before the sentence of deportation is to be carried into effect, and that such imprisonment is to be adjudged against the accused by a justice, judge, or commissioner, upon a summary hearing.

The Court held the imprisonment provisions unconstitutional, saying (p. 981):

> But when congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

The Act now in question proposes to assign defendant to a camp at hard labor upon a mere ministerial act of the Selective Service administration for an indefinite period, presumably for the duration of the present war, and six months thereafter, merely because petitioner is a conscientious objector to war. No trial is provided. Since the Act makes provision for such imprisonment at hard labor without judicial process, it is unconstitutional under the authority of the case last cited.

The Act merely says that the conscientious objectors shall "be assigned to work of national importance under civilian direction." It does not give the President, the Director of Selective Service, the Local Boards, or any other person or agency power to imprison petitioner at hard labor with loss of liberty and without compensation. The regulation, therefore, is in excess of the powers conferred under the Act, and the indictment and all that followed in the courts below is invalid and the judgment should be reversed. The regulations, if they can be said to be authorized by statute, then violate Amendment Six to the Constitution of the United States providing:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, * * *."

The provision also violates Art. I, Sec. 9 of the Constitution, providing:

> "No Bill of Attainder or ex post facto Law shall be passed."

In "Constitution of the United States of America," Annotated to January 1, 1938, published by the Government Printing Office, it is said (p. 281):

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution bills of attainder include bills of pains and penalties. * * *"

Since the regulation in question, if authorized by Congress, inflicts legislative punishment upon conscientious objectors without judicial trial, the regulations, with respect to assignment to Civilian Public Service camps, as and if law, is a bill of pains and penalties and is unconstitutional and void.

CUMMINGS vs. MISSOURI, 4 Wall. 277, 323.
PIERCE vs. CARKSADON, 16 Wall. 234.

The constitutional objection to the internment of defendant in the Civilian Public Service camp is aggravated by the fact that the offense consists in entertaining an opinion based on "religious training and belief" (Act, Sec. 5(g)), and not upon any overt act of a recognized criminal nature.

This attempt by Congress, through the regulations, to confer judicial power upon the Local Draft Board and the Director of Selective Service, operating through his delegates, the National Service Board for Religious Objectors, and others, is an exercise of judicial power required by Art. III, Sec. 1 to be vested in courts of law. The assignment of defendant to a Civilian Public Service camp is and was a deprivation of his liberty, and internment in prison or confinement in a jail because of conscientious convictions based upon religious training and belief, and therefore void.

DEN EX DEM MURRAY vs. HOBOKEN ILL. CO., 18 How. 272; 15 L. Ed. 372.
U. S. vs. JU TOY, 118 U. S. 253; 49 L. Ed. 1040.

4. *Indictment lacks definiteness, and subsequent proceedings below are void because the Act does not set up an ascertainable standard of guilt.*

The indictment, and the law upon which it is based, cannot be so vague as not sufficiently to specify and create an ascertainable standard of guilt. The Act in question, as well as the regulations and order purporting to be issued thereunder, and the indictment founded thereon, are too indefinite to create a standard of guilt in that the Act contains no provisions and no standards upon which a reasonable regulation may be based as to the following particulars:

a. Nature of the work; b. Place of work; c. Hours of work; d. Compensation; e. Supervising agency or personnel by whom assigning is to be done; f. Nature of the assignment; g. Requisites as to consent of assignee; h. Tests of work of national importance as distinguished from combatant and non-combatant service in the land and naval forces; and i. Definition of work of national importance under civilian direction.

The whole provision of the Act bound up in the words "be assigned to work of national importance under civilian direction" is too vague and uncertain to provide an ascertainable standard of guilt. There is no authority in the Act to require any person to do work away from his usual place of habitation; to uproot him from his family and take him away from the place where his property and life savings may be invested; to require him to perform one class of work of national importance when he is already performing work of another class of equal national importance; to require him to leave work under civilian direction to be confined twenty-four hours of the day under a military or penal regime at least in part; and there is no provision in the Act or regulations that any person or agency may issue an order requiring any assignment to be fulfilled where the assignee declines to accept the assignment.

"Work," in the common American acceptation of the word, means work of the free born, or free man. Congress, in using the word "work," must have used it in the common sense of work under American conditions of freedom. Work and slavery are not synonymous and the attempt to impose upon conscientious objectors work under slave conditions does not meet the statutory intent and meaning of the word "work" as used in Sec. 5(g) of the Act. Congress, of course, was free to ignore the ordinary meaning of the word "work," and make a definition of its own, provided the

device be not used to change the nature of the thing to which the word is applied.

CARTER vs. CARTER COAL CO., 298 U. S. 238, 289; 56 S. C. 855, 863.

Congress did not, however, indicate that it was using the word "work" in any other than its ordinary meaning.

In Defendant's Ex. H, refused admission, the National Service Board for Religious Objectors states, (p. 8):

> "The present program gives the religious groups of America an opportunity to demonstrate in a practical way their faith in a type of life that does away with the necessity of war. It presents a great responsibility and a challenge to show that they are prepared to make financial sacrifices to support the things they hold precious in our democracy."

We presume that there is no doubt that the high-minded gentlemen who devised the arrangements whereby Civilian Public Service camps were set up were actuated by benevolent purposes. This court, however, has, in the last case cited, expressly stated that beneficent aims, however great, can never serve in lieu of constitutional power. (298 U. S. 238, 291, 56 S. C. 855, 864)

Sec. 652.1 of the regulations does not in fact supply the omissions of the Act with respect to any authority to make orders transporting defendant or any other assignee from his usual place of employment to these concentration camps, known as Civilian Public Service camps.

Since the Act, the regulations, and the indictment are void, the judgment should be reversed.

U. S. vs. COHEN GROCERY CO., 255 U. S. 81; 41 S. C. 298.

WEEDS vs. U. S., 255 U. S. 109; 41 S. C. 306.

The former case is also authority for the rule that war does not suspend the limitations of the Constitution.

The language of the Court below, in its opinion, (p. 7) (7.) says:

> "Unfortunately defendant is not the only one of the group which is determined not to take up arms in their country's defense. Much time is taken in an effort to make clear the issue which confronts the citizen who refuses to obey the command of his government. Perhaps it is wasted time."

This language indicates lack of sympathy by the Court with the provisions of Sec. 5(g) of the Act. It suggests that the Court believes that in time of war the Constitution is suspended and that the government may command its citizens, including the defendant. This Court should take jurisdiction of this case in order that a clear enunciation may be made of the duties of courts in time of war to protect the constitutional liberties of United States citizens. If such liberties are to be retained in time of peace, they must be protected and defended in time of war.

5. *Indictment and all subsequent proceedings below are void because indictment does not negative statutory proviso.*

The Act, at Sec. 5(g), provides that a person found to be conscientiously opposed to participation in non-combatant service shall, in lieu of induction, be assigned to work of national importance under civilian direction. The indictment (T. 2) does not allege that the assignment in question was in lieu of induction, nor did it recite that the work was to be under civilian direction. Since, in the very nature of the case, a conscientious objector who declines to engage in non-combatant service is, by religious training and belief, conscientiously opposed to accepting service under military direction, it is of the essence of the Congressional exemption that the work for which assignment is suggested be under civilian direction. This proviso for civilian direction is so inherent in the Congressional exemption and so closely incorporated therein that the indictment founded upon the statute must allege enough to show that the assignment alleged in the indictment conformed to the Congressional proviso. Possibly the reason the language was omitted from the indictment, which in other respects followed the statute, is that the work at Civilian Public Service camps is not entirely under civilian direction as the regulations and discussion in this brief indicate. Since the indictment is defective the judgment should be reversed.

U. S. vs. COOK, 17 Wall, 168, 182; 21 L. Ed. 538, 539.

6. *Failure of defendant was not wilfull.*

The defendant, having disobeyed the so-called order notifying him to report, was acting as required by the dictates of his conscience. (T. 65, 74) His failure was not

wilfull within the meaning of the indictment as is shown by the fact that he reported to the United States Attorney at the hour fixed (T. 83), and upon receipt of notice of delinquency responded by letter. Accordingly, defendant's act was not wilfull within the meaning of the indictment.

U. S. vs. MURDOCK, 290 U. S. 389, 395; 54 S. C. 223, 226.

7. *Provision in the regulations that no registrant may be represented by counsel is lack of due process.*

The regulations provide at Sec. 625.2(a) that "No registrant may be represented before a Local Board by an attorney." This provision stamps the Selective Service System as lacking in respect for the ordinary rights of registrants over whom it assumes to exercise authority, and is void as a denial of due process. The local board or its clerk in this case refused to permit petitioner's lawyer to examine defendant's records in the Board.

POWELL vs. ALABAMA, 287 U. S. 45, 68, 69.

COOKE vs. UNITED STATES, 267 U. S. 517, 527.

FELTS vs. MURPHY, 201 U. S. 123, 129.

8. *Indictment was investigated, voted and returned too late.*

By 28 U. S. C. A., Sec. 195, it is provided the terms of the District Court for the Eastern District of Wisconsin, shall be held at Milwaukee on the first Mondays of January and October; at Oshkosh on the second Tuesday in June; and in Green Bay on the first Tuesday in April.

By 28 U. S. C. A., Sec. 421, it is provided, among other things:

> A district judge may upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than 18 months."

The jury in this case was empaneled at the January Term 1942 of the District Court for the Eastern District of Wisconsin (T. 2), and the indictment was not returned and filed in open court until October 1, 1942. (T. 2)

The alleged order which the defendant is charged with having disobeyed was mailed Aug. 11, 1942 (T. 60), and

requested that defendant report Aug. 24, 1942. The defendant was interviewed by the agent for the Federal Bureau of Investigation about Sept. 22, 1942 (T. 64). The crime, alleged to have been committed, did not, therefore, occur before Aug. 24, 1942 and could not have been the subject of investigation during the January term of said District Court. The investigation of defendant's alleged crime necessarily arose after the June term had commenced. No valid order authorizing this jury to continue to sit after the January term could be made as to defendant's alleged crime. Each separate offender, in absence of a charge of conspiracy involves and requires a separate investigation within the meaning of 28 U. S. C. A., Sec. 421, *supra*.

In *Harlan vs. McGourin*, 218 U. S. 442, 31 S. C. 44, the case of *Ex parte Harlan*, 180 Fed. 119, 132, was affirmed. The lower court stated that where terms of court are created to commence at different places within a district where there is only one judge, a legislative intent is evinced to interrupt the sittings of the court for each place named by the commencement of a new term at the new place. This court will take judicial notice that there is only one District Judge for the Eastern District of Wisconsin. The legislature must have intended to interrupt the January term at Milwaukee when requiring the district judge to commence the April term in Green Bay and the June term in Oshkosh. Each term of Court is for the entire district, by 28 U. S. C. A., Sec. 195, *supra*. A term of court for the Eastern District of Wisconsin necessarily cannot commence on the first Tuesday in April, or on the second Tuesday in June, without terminating the preceding terms, the January and April terms, respectively.

In *U. S. vs. Johnson*, decided by this Court June 7, 1943, 63 S. C. 1233, 1235, it is said:

> "Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance."

At page 1237 the Court states that the grand jury

> "is not forbidden to inquire into new matters within the general scope of its inquiry but only into a truly new, in the sense of dissociated, subject-matter."

The subject matter of petitioner's infractions of the law, if any, must necessarily be dissociated from the investigation of infractions by other defendants where no conspiracy is charged. If this were not true, the provision of the statute would be meaningless since a grand jury of course is empowered and called to inquire into all crime committed within its jurisdiction. Where the crimes are totally disconnected, the investigation of each must necessarily be dissociated. The investigation of petitioner's case was necessarily commenced after the power of the Grand Jury to commence new investigations had expired. The indictment, therefore, is without legal authority and the proceedings below based thereon should be reversed.

B. The decision of the Circuit Court of Appeals decides an important question of general law in conflict with the weight of authority.

9. *So-called order signed by one member, without action or vote of the Board, is illegal and indictment and subsequent proceedings below founded thereon are void.*

The Selective Training and Service Act of 1940 provides at Sec. 10 that the President is authorized to create a Selective Service System and establish within it civilian Local Boards, and other civilian agencies. The Act provides:

> "No member of any such Local Board shall be a member of the land or naval forces of the United States, but each member of any such Local Board shall be a civilian who is a citizen of the United States, residing in the county or political subdivision corresponding thereto in which such Local Board has jurisdiction. * * * Such Local Boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the Appeal Boards herein authorized, all questions or claims with respect to for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such Local Boards. The decision of such Local Boards shall be final, except where an appeal is authorized * * *."

By Sec. 10 (a) (3) the President was authorized to appoint a Director of Selective Service, and such other officers and employees as he may deem necessary, provided

that any officer on the active or retired list of the Army, Navy, Marine Corps, or Coast Guard, or of any reserve thereof may be assigned or detailed to any office to carry out the provisions of the Act, except as to offices or positions on local boards, appeal boards, or agencies of appeal established pursuant to Sec. 10 (a) (2) referred to above. The decisions then, which the law provides, shall be final (see opinions below in this and Mroz cases) are those of the civilian local boards.

The regulations, at Sec. 603.56, provide for meetings of the local boards and that every member shall vote on every question. The so-called order to report recites "Having submitted yourself to a local board composed of your neighbors * * * you have been assigned to work of national importance under civilian direction." (T. 13). The implication is that the assignment of defendant was made by his local board. The evidence is to the contrary. The clerk of the board testified that

> "When Mr. Davlin signed this order no other members of the Board were present. * * * No votes are ever taken by the Board as to the issuance of this order to report. (T. 61) * * * The order to report was not directed to be issued by any person by our Board as a result of any meeting held by the Board. That is clerical procedure. We just have a member sign it. * * * The order to work was issued on the basis of General Hershey's letter. * * * The order to report for work was issued by our Board because of an order received from some person in higher authority. We wait for instructions from Madison. We issued the order in response to the language: (T. 73)
>
> "'The above registrant, having been reported to national Headquarters as being in Class IV-E, and with his order number reached, is assigned to Merom Camp, Merom, Indiana, and is to be ordered to report for work of national importance on August 24, 1942, by you.'
>
> "By 'you' is meant Local Draft Board No. 2. After receipt of the letters we sent this Form 50, order to report for work."

It appears clearly from the record that the order in question was not that of the local board, but that of the National Director of Selective Service given over the signature of a member of the local board. Proofs, therefore, (See T. 98)

fail to support the indictment which stated that defendant's crime was the failure to perform a duty, i.e., to carry out "a direction or order issued by Local Board No. 2 of Milwaukee, Milwaukee County, Wisconsin, for him, the said Walter Ford Gormly, to report * * *." (T. 2)

At Sec. 603.54 the local board is given full authority to do and perform all acts authorized by the Selective Service law.

By Sec. 603.1 the Director of Selective Service has his duties prescribed for him, and at no point is he given authority to make orders directly to registrants. His powers relate to administrative matters and not to those matters relating to the direct dealing between local board and registrant, required by the Act to be under civilian direction.

Sec. 652.2 of the regulations provides that the Director may assign conscientious objectors to camp. As shown by defendant's exhibit H, the Director, in turn, has delegated to the National Service Board for Religious Objectors the duty of making assignments, subject to his approval. This is an assumption of power by the Director not contemplated by the Act.

Sec. 627.1 gives the National Director power to appeal from determinations of local boards and appeal boards. This puts him in an adversary position, inconsistent with any power to issue orders to local boards in matters of selection and induction.

By Sec. 632.3 the local board selects the men who shall be inducted. An assignment made by the Director is accordingly an assumption of authority not his. The assignments of defendant to report to the Camp at Merom, Indiana, first on July 21, 1942, and later on August 24, 1942, were ineffective until adopted, ratified, and approved by the Local Board, which action was never taken, except by the unauthorized act of the Secretary as a member of the Board.

The Court below, by reading Sec. 652.1, 652.2, and 652.11, concludes (p. 4): (T. 97)

> "that the order to report was not a discretionary order of the Local Board requiring the meeting of the Board and a *determination* of the Board to issue it. It was a notification practically of statutory stature, being the prescribed form of notice designated by the regulations to be issued upon *order* of the Director of

> Selective Service. When the Director so notifies the Board to act, *it must do so.* No meeting of the Board is necessary to pass upon the advisability of issuing the order to report or of the terms of the order."

The Court below thus approves regulations which depart from the statute, and permits the Director to issue orders which Congress said should be the subject of determination by civilian local boards. A regulation cannot be considered law or "of statutory stature" which departs from the plain terms of the statute. Furthermore, the regulations, at Sec. 652.11, are silent as to the issuance of the so-called order in question.

Sec. 652.11 provides that upon receipt of an assignment to work of national importance, Form 49, the local board shall prepare six copies of an order to report, Form 50, and mail the original to the registrant at least ten days before the date set for him to report. Nothing is said about the issuance of a direction or order, such as the indictment says was issued by local board No. 2 (T. 2). Neither the law nor the regulations provide for any action by the Local Board except mailing the original of a form labeled "Order to Report." The regulation does not say whose order it is since the National Director has only, under Sec. 652.2, made an assignment.

Petitioner raises the question whether he can be sentenced to jail for five years for failing to obey a so-called order which neither the law nor the regulations provide shall be made by any person in authority.

The Court below says the "order to report was not a discretionary order," but a ministerial act. A "ministerial act" consists in the discharge of some duty enjoined by law where no judgment or discretion is required. *Lechleidner vs. Carson*, 68 P. (2) 482, 848; 156 Or. 636. There was judgment and discretion required to be exercised by the board up to, including, and even beyond the issuance of the so-called order in determining whether at that time he should still be continued in Class IV-E. (Regulations, Sec. 626.1) (T. 47, 48)

A "ministerial act" is one which may be compelled by mandamus. *State ex rel. Millers Nat. Ins. Co. vs. Fumbanks*, 151 S. W. (2) 148, 150, 151; 177 Tenn. 455. I do not believe that this Court will consider that acts of Local Draft Boards can be compelled by mandamus, although perhaps the decision of June 9, 1943 in this case, if allowed

to stand, opens the door to such action. To be a "ministerial act" the law must prescribe the time, mode and occasion for the act with such certainty that nothing remains for the judgment. *Merlette vs. State,* 14 So. 562, 563; 100 Ala. 42. Yet, in this very case a similar direction was disregarded by the draft board. (T. 79, R. 110, Ex. L). (See letters dated June 20, 1942 and July 6, 1942, Ex. A (11) and (12), T. 71).

The local board exercised its discretion and did not issue the order to report because, as the Court points out, (T. 9 p. 2, instead of sending out Form 50, in accordance with the notice of June, 1942, "The local board carried on some correspondence as to whether the appellant had been assigned to the proper camp due to a question arising out of a change in residence." It will be noted that the regulation 652.11 provides for the mailing out of Form 50 (T. 9 upon receipt of an "assignment to work." The mailing out of a form is not making or issuance of an order, and the law does not prescribe when or how, or by whom such orders shall be issued or made.

The local board must pass on the fitness of the registrant by Sec. 622.61, and 622.62, and place in Class IV-F any person morally unfit, physically or mentally unfit for work of national importance. It has been held that determination of fitness is not a mere ministerial act, but involves the exercise of judgment. *Long vs. Somervell,* 22 N. Y. S. (2) 931, 936.

The difference between the issuance of an order and the entry thereof, the former discretionary and the latter ministerial, is pointed out in many cases collected in 27 Words and Phrases (Perm. Ed.), p. 252 seq. "Ministerial Act." *Allan vs. Miller,* (Neb.) 6, N. W. (2) 594, 598; *Application of Gleit,* 33 N. Y. S. (2) 629, 631. The filling out of a form is like the record of the judgment by a clerk, and is not the rendition of the order which is judicial. Signing the form might be ministerial if there were an order in fact.

Since the work is to be under civilian direction, Congress must have contemplated that the assignment, if any, be made by the civilian branch of the Selective Service System, namely the local draft board. In making the assignment the board would necessarily have to determine: 1. whether a new assignment should be made if the work

the registrant was then doing was work of national importance; 2. if not, what work was then available in the locality; 3. which of such work, if any, the registrant was qualified to do; and 4. whether he was willing.

The proper determination of these facts would require a hearing and the present lack of hearing shows lack of due process in the case before the court.

> MORGAN vs. U. S., 298 U. S. 468, 480; 56 S. C. 906; 80 L. Ed. 1288.

If the registrant is unwilling to accept the assignment to work of national importance the Act is silent as to the next step. Power to assign does not include power to order or compel acceptance of the assignment. Such construction would render the provision unconstitutional. We do not find any definition of the word "assign" in Words & Phrases, (perm. ed.), or 1943 pocket part, fitting the sense in which the word is or may be used in the Selective Training and Service Act of 1940.

In Webster's International Dictionary (2nd ed., unabridged) the transitive verb "assign" is defined, among other meanings, as "to appoint or consign (one) to a post or duty; also, to prescribe, as a course of *action* or a task" quoting 2 Sam. XI:16. Whether the word connotes power to enforce depends upon surrounding circumstances. Since Congress is dealing with civilian direction and not military power, and any other meaning would be in derogation of natural rights, the necessary connotation is mere assignment and reassignment until some voluntary basis or arrangement is worked out agreeable to the citizen concerned.

It is good general law that an administrative body, such as is the local board, cannot exceed its statutory powers and must administer the laws made by the legislature, Congress.

> *State ex rel. Madison Airport Co. vs. Wrabetz,* 231 Wis. 147, 153.
>
> MONTELLO GRANITE CO. vs. INDUSTRIAL COMMISSION, 197 Wis. 428, 431.

10. Alleged order is void because it violates petitioner's rights under the First Amendment.

Amendment I to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The alleged order (T. 13) it is claimed required petitioner to report so that he might be transported to Merom Camp at Merom, Indiana. The management of this camp is under the direction of approved representatives of the National Service Board for Religious Objectors. (T. 69) Selective Service Regulations, Part 691, is to the same effect. As quoted from proffered exhibit H earlier herein, the Board operates through administrative agencies which will be recognized as representing four religious denominations, to-wit: 1, The Friends or Quakers; 2, the Catholic Church; 3, the United Brethren; and 4, the Mennonites. As said excluded exhibit shows, Camp Merom is administered by the American Friends Service Committee. Petitioner does not belong to the Friends, but to a different religious organization—the Methodist Church. Did Congress intend to authorize the President to assign a Jew to a camp conducted by the Catholic agency, or an Episcopalian to a Mennonite camp? The regulations have brought a voluntary religious organization, representing four religious denominations, without any authority in the Act.

In Cooley's Constitutional limitations (Third Edition), (p. 467), it is said:

> "Whoever shall examine with care the American constitution will find nothing more fully stated or more plainly expressed than the desire of their authors to preserve and perpetuate religious liberty, and to guard against the slightest approach towards the establishment of inequality in the civil or political rights of citizens, based upon differences of religious belief."

* * * (p. 469)

> "The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects.

In Cooley's Principles of Constitutional Law (Third Edition) it is said, (p. 224):

> "By establishment of religion is meant * * * the conferring upon one church of special favors and advantages which are denied to others."

Being a religious organization representing a few denominations in charge of all conscientious objectors' camps

throughout the country is a preference for the sects represented contrary to the policy of our government and this court should disapprove of administrative adoption of any such policy where not authorized by law. At this point we quote also from Cooley's Constitutional Limitations, (p. 477, 478):

> "Whatever deference the constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is to avoid with care any compulsion which infringes on the religious scruples of any, however little reason may seem to others to underlie them. Even in the important matter of bearing arms for the public defense, those who cannot in conscience take part are excused, and their proportion of this great and sometimes imperative burden is borne by the rest of the community."

It is regrettable that the *Arver case* discarded this important American principle and acted upon legislative precedents alleged to be current in Great Britain, Germany, Italy, Japan and other countries, many of whom do not share our form of government or free way of life. The last quotation, however, supports our claim that petitioner cannot be compelled to accept assignment to a camp conducted by a voluntary organization with limited or special denominational religious ties. The *Arver case* does not control the law or facts in this case. The present law is very different. Powers of government cannot be delegated to voluntary associations, such as the National Service Board for Religious Objectors.

SCHECHTER POULTRY CORP. vs. U. S., 295 U. S. 495, 537; 55 S. C. 837, 846.

11. *Defendant did not receive due process and a fair trial, required by the Constitution and the law of the land.*

a. *Jury not a fair sample.*

Among 22 jurors drawn by lot from the panel to try defendant, five were retired employees of the United States Post Office Department. Defendant moved for new trial on this ground, motion was denied and exception taken. (T. 90)

b. *The Court was prejudiced.*

The Court was prejudiced against defendant because he

is a conscientious objector, as shown by the statement (T. 91):

> "Nevertheless, if that right, that you exercise to determine for yourself what is and what is not combatant or noncombatant military or non-military service, were exercised by every American citizen, then there would be no freedom of right to exercise anything in this country or anywhere else in the world."

The Circuit Court of Appeals also was prejudiced against conscientious objectors, and such prejudice is shown in the opinions of the court in this case and in the *Mroz* case quoted above. The Court below, in its Mroz opinion (p. 6), speculates as follows: (p. 24 supra)

> "His challenge, if successful, would jeopardize the country's defense in time of war. *That may have been defendant's object*, or his action may have resulted from an over exaltation of self and minimization of the obligation of a citizen to society. Whatever his mental reaction to a war status may have been, the result is the same." (Emphasis ours)

This intimation of intent bordering on treason does not comport well with Congressional intent.

Because of the action of defendant Mroz anticipating his test of the draft board's action, by legal proceedings, the court said, (p. 7) (p. 25 supra)

> "He cannot 'take the law into his own hands' * * *."

The Court is oblivious to the stature of an individual citizen and the fact that his rights are not suspended by fortuitous emergencies, however important, the court saying, (p. 8): (p. 25, supra)

> "Appellant dwells on lack of a due process hearing, and on arbitrary and capricious action. He seemingly fails to realize that war is realistic, that the emergency requires immediate mobilization of a large manpower; that each case must be handled individually yet speedily."

The acid statement in the Mroz opinion, (p. 9) to the effect that the local board placed the defendent Mroz "in a category where his valued life is safer than that of many of his fellow citizens," reflects a prejudice against conscientious objectors, and raises a doubt as to whether the contentions as to the validity of the order of the board received rational consideration by the Court. (p. 26 supra)

The Court imputes the defendant's position to his counsel, although the record will show counsel was changed between time of trial and time of appeal. (pp. 3, 9) (pp. 22, 26 supra)

The same prejudice is shown in the Gormly opinion below (p. 5): (T. 48)

> "And finally no doubt, he was possibly prompted by the belief that his conscientious objector's plea had secured for him avoidance of military duty, and stubborn reliance on this objection to a citizen's duty might obtain for him complete immunity from all such citizen's obligations."

Apparently, judging from this speculation not based on the record, the Court is not in accord with Congressional intent. (T. 100)

Again, (p. 7) the Court below castigates defendant as a "citizen who refuses to obey the command of his Government." In the Gormly opinion below no cases are cited by the Court as precedents.

c. *Evidence objected to was improperly received.*

Defendant objected to the receipt in evidence of a statement taken by the F. B. I., and this statement, received over objection, was read at length to the jury. (T. 64)

d. *Court refused to require production of evidence in possession of the government.*

The defendant requested that a certain record in the possession of the local board be produced at the trial. The Court declined to require its production although it was in possession of the local board. (T. 71) This refusal violated the constitutional provision, Amendment Six of the United States Constitution, that the defendant shall enjoy the right "to be confronted with the witnesses against him," and "to have compulsory process for obtaining witnesses in his favor." The witness admitted that the subpoena required the production of all records of the draft board. (T. 61)

e. *Court permitted improper cross examination of defendant.*

Defendant was put upon the stand to testify with respect to certain papers relating to the case which the police had taken from him and had not returned. (T. 63, 81, 82) Over objection the Court permitted the government

to inquire as to the contents of the papers which was beyond the scope of the direct examination.

f. *Court conducted parts of the trial out of the presence of defendant.*

Court required counsel for defendant, when offering exhibits or attempting to elicit testimony which the Court considered might be objectionable, to retire from the court room with the court reporter. The defendant was excluded from or not present at such portions of the trial conducted in chambers. (T. 66, 68, 76) Such practice violates the rule that the defendant is to be present during the whole course of his trial.

g. *Court improperly excluded proffered evidence and testimony.*

As bearing on the question of work of national importance, the Court excluded testimony that the work done in Civilian Public Service camps is substantially the same as that done in Civilian Conservation Corps. (T. 68)

The Court also excluded the offer of defendant's Ex. B, regulations of the War Department, to show rates of pay allowed members of the Civilian Conservation Corps. (T. 68)

The Court excluded defendant's proffered Ex. D, being official publication of the Forest Service, to show that work in the Civilian Conservation Corps was terminated, this bearing on the allegation of the indictment (T. 2) and proof that defendant was to be transported to Camp Merom (T. 13) for "work of national importance." (T. 69)

The Court required counsel for defendant to offer exhibits outside the presence of the witness, expected to identify them, and erroneously refused to receive defendant's Ex. H, being an official bulletin of the National Service Board for Religious Objectors, the agency mentioned in Ex. C, received in evidence, and Part 691 of the official regulations. Said Ex. H contains important facts and information bearing upon defendant's case. (T. 76)

The Court erroneously refused to receive defendant's proffered Ex. I, being a publication of the administrative agencies representing National Service Board for Religious Objectors, in which it is stated that the conscientious objector is assigned to camp "for the duration," and "receives no pay for his work." (T. 77)

The Court erroneously refused to receive defendant's proffered Ex. J, being a bulletin published by one of the administrative agencies representing the National Service Board for Religious Objectors, in which the aims and objectives of Civilian Public Service Camps are set forth. The exhibit shows such wide departures from the congressional aim of "work of national importance," as that the aims of Civilian Public Service Camps are "development of attitudes necessary to world reconciliation"; "promotion of health * * * as the physical basis of the more abundant life," and "defense of the spiritual values of democracy and of personal freedom under the laws of God and the state." (T. 77, 78)

The Court erroneously excluded defendant's Ex. L, which was an official communication to him from the Civilian Public Service camp to which he had been assigned (T. 79, 82), and defendant's Ex. M, which was a letter from the same camp containing information bearing upon defendant's defenses in this case. (T. 80, 82)

g. *Improper argument to the jury defeated fair trial.*

The Court did not stop or caution counsel for the government, and the Assistant United States Attorney in arguing to the jury used inflammatory language not necessary to the decisions of the case. Such argument deprived defendant of a fair trial. The District Attorney argued that the defendant set himself up above the law (T. 84), and said:

> "He invokes all the rights, but he refused to perform the duty placed upon him by that law. He is sufficient unto himself. No matter what the other millions of people in the country might say or feel, he is going to determine for himself whether or not he should obey this law." (T. 84, 85)

The District Attorney, although aware that evidence bearing upon the question as to whether work in Civilian Public Service Camps is of national importance, had been excluded on his objection, argued to the jury, that defendant's failure "to report for work of national importance at a camp of a civilian nature where he would do work for his fellow citizens which was absolutely non-military, while other men his age were fighting and dying on the battlefields of the world in this present war." (T. 85) should convict him.

The District Attorney argued that defendant's action would result in anarchy, and in rebuttal that the fact that defendant reported to the District Attorney on Aug. 24, 1942, "was just an additional exhibition of his defiance of the law." (T. 88) Such argument was not germane to the issues and was intended to arouse prejudice against defendant.

h. *The Court improperly narrowed issues of indictment.*

The Court said: (T. 81)

> "the issues in this case are two: Whether or not Defendant received a notice to report, and whether or not he did report. Those are the only two issues for the jury to determine in this case."

In the instructions he amplified the issues to three: One, was defendant properly ordered to appear, (2) did he receive such an order, and (3) did he fail to report? (T. 38) The Court thus took from the jury all questions of fact involved in the indictment as to whether the work at Camp Merom was of national importance and under civilian direction.

i. *The Court improperly expropriated the function of the jury.*

The Court, having stated that the question as to whether the defendant was properly ordered to appear was a question for the jury, anticipated the jury's answer and substituted Court action for jury action by instructing the jury on this issue: (T. 37)

> "Accordingly, *this Defendant was*, subsequently to the consideration of his questionnaire and his classification as IV-E, ordered assigned to such a camp and *ordered to report* for service at such a Public Service Camp." (Emphasis ours)

The Court further instructed the jury: (T. 37)

> "When an order of the Local Draft Board becomes final and is validly made, it is no defense for the registrant to whom the order was issued, in wilfully failing to obey that order, that he does so by reason of religious beliefs."

Thus, supplanting the jury as to whether the order was validly made, by implying that the order in question was final, the Court instructed the jury that defendant's

conscientious objections to performance of the supposed order could not be considered by the jury. Due process required that the issues of fact be submitted to the jury without any attempt by the court to prejudice them.

KONDA vs. U. S., C. C. A. 7, 166 F. 91, 93.

The Court there said:

> "Our conclusion is that an accused person has the same right to have 12 laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting."

C. Decision of the Circuit Court of Appeals is at variance with decisions in other circuits.

12. Ruling that an order of a local board may not be questioned or inquired into as to its validity is not good law.

The Court below, in a manner, indicated that it was a jury question whether the defendant was properly ordered to appear (T. 38), and that when the order of a local draft board becomes final *and is validly made*, it must be obeyed. While the court thus indicates that some inquiry may be made into the validity of the order, the effect of the rulings, and the instructions was to deny such inquiry. In the dissenting opinion of Justice Jackson in *Bowles vs. U. S.*, decided by this Court May 3, 1943, it is said:

> "The Court does not consider whether one may be convicted for disobeying an invalid order; * * *. But I would not readily assume that, whatever may be the other consequences of refusal to report for induction, courts must convict and punish one for disobedience of an unlawful order by whomsoever made."

As this point was not ruled upon by the majority, we trust that this expression is the majority rule since it is the general rule.

The court below, in its opinion, says (p. 5):

> "The essential requirements are that a direction be given by the Director of Selective Service and that defendant be informed that an order assigning him to a camp has been made. Both of these requirements were conclusively shown to exist in this case. They

were not questioned by defendant until his counsel asserted their necessity."

Of course, counsel should be expected to assert defenses, and defendant, before being represented by counsel, would hardly be expected to anticipate the defenses to be later asserted by his counsel. In this case and the *Mroz case,* it is not clear whether the Court below would in all cases support an invalid order or classification.

The court says, referring to the classification of the local board, (p. 7) :(part of Mroz opinion omitted at top of p. 25 supra)

"The statute makes such decision final. It follows that he was not entitled, in this criminal case, to attack that finding,"

citing *Bowles vs. U. S.*, U. S. Supreme Court, May 3, 1943. The citation does not support the proposition.

The court also says (p. 7) : (p. 25 supra)

"Appellant's clear and unqualified duty was to comply with his draft board's order."

This statement is not qualified to distinguish between an invalid and a valid order, although the court, on (p. 8) says: (p. 25 supra)

"Appellant dwells on lack of due process hearing, and on arbitrary and capricious action."

The court does not say what, in its opinion, would be the effect of lack of due process or arbitrary action. The court, at footnote 7, (p. 25 supra) cites and emphasizes quotations from cases in the second and third circuits to the effect that a registrant is bound to obey orders of his local board. Yet, as we now show, some of these cases stand for the proposition that the court will not enforce an invalid order.

The following cases in other circuits we believe hold that an invalid order, made without jurisdiction, or beyond the powers of the board, would be a defense to criminal prosecution.

In *Seele vs. U. S.*, 8 Cir., 133 F. (2d) 1015, it was stated that where the decision of the Director is final, it is not subject to review "at least unless the decision is wholly unsupported by evidence, wholly dependent upon a question of law, or clearly arbitrary or capricious."

In *U. S. vs. Grieme*, 3 Cir., 128 F. (2d) 811, the Court stated that courts uniformly hold findings of draft boards final *unless full and fair hearing is not afforded, or the*

draft board acts contrary to law, or abuses discretion given by statute.

In *Rase vs. U. S.*, 6 Cir., 129 F. (2d) 204, it is stated that the only question of fact was whether the draft board accorded a fair and impartial hearing, and whether its decision was based upon evidence or was arbitrary and capricious. It was held there was no error in failing to submit other questions to the jury.

In *Johnson vs. U. S.*, 8 Cir., 126 F. (2) 242, it was held that no draft board can bind a defendant by an arbitrary classification against all substantial information, and that classifications must be honestly made and not arbitrarily. The court said (p. 247):

> "Courts can prevent arbitrary action of such agencies from being effective. But a registrant cannot come to a court for such relief until he has exhausted all available and sufficient administrative remedies for such arbitrary action."

Petitioner here has exhausted all administrative remedies, since the issues here do not concern his classification, and the regulations do not provide for any appeals by registrants, except as to questions of classification. (Reg. Sec. 627.2)

In *Checinski vs. U. S.*, 6 Cir., 129 F. (2) 461, the Court held that board records might be reviewed, and in the absence of proof of any failure by the board to consider evidence presented, or to give a fair hearing, the registrant would be without power to review his classification.

The language of these cases, if not the results, indicates that when there is presented to them cases in which an invalid local board order appears, such invalidity will be given effect whether due to failure to consider uncontroverted evidence submitted, unfair investigation, result clearly contrary to law, or other arbitrary or capricious action amounting to lack of due process. The action of the trial court, affirmed below, appears, therefore, to be in conflict with the law, as announced in these other circuits.

Because of this apparent conflict between the seventh and the third, sixth and eighth circuits, as well as on the other grounds herein set forth we urge the Court to issue a writ of certiorari in this case.

CONCLUSION

The court below, in *U. S. vs. Mroz*, quoted herein, says, (p. 9 of opinion): (p. 26 supra)

> "It is hard to conceive of any government at war dealing more considerately with its citizens who express conscientious objections to war than does the government of the United States of America."

The fact is that the government of Great Britain deals more considerately. From literature which we have examined, such as "Memorandum on the National Service Acts," 1939-1941, obtainable from H. M. Stationery Office, York House, Kingsway, W. C. (2), and "The Conscientious Objector and the National Service Acts," published by the Central Board for Conscientious Objectors, 6 Endsleigh Street, London W. C. 1, England, and other publications, it appears that the National Service Acts contemplate that conscientious objectors in England may be exempted from military service without any conditions. We are informed that as of July, 1942, over 2,500, or about 5% of those who were examined by the Local Tribunals, were given unconditional exemption. It appears fines ordinarily amount to £5, but in summary convictions by the court the fine may be up to £50, or imprisonment not exceeding 12 months, and on indictment, up to £100 or imprisonment for two years. In the United States, the fine may be $10,000 and jail up to five years. It appears also that registrants in England may appear by attorney, or other representatives. They are entitled to hearing *de novo* on appeal. Their expenses in attending hearings and trials and expenses of their witnesses are advanced to or reimbursed to them under the Acts. Work camps have not been established in England, and persons who have been exempted on condition that they do work of national importance many of them have remained at the work which they were then doing. They are not denied the fruit of their labor. "The Reporter" for May 1, 1943, Vol. 1, No. 16, published by the National Service Board for Religious Objectors has an article on "British C. O.'s," in which the author, William Eves, Chairman of the Foreign Service Section of the American Friends Service Committee, says:

> "It would appear that there is greater objection in England to conscription as a system. Very few have refused to register for the draft in America

even though absolute exemption is not possible. Regimentation would seem to be more objectionable to the English sense of freedom than in America."

This Court is the last line of defense for individual freedom in this country. We pray the Court to protect petitioner and those principles which differentiate Americans from the abject subjects of other systems of government.

In the Harvard Alumni Bulletin for April 24, 1943, pp. 496, 499 is a graphic description of the "Tenaru River Fight." Major John Howland, a lawyer, there states that of the Japanese "Jungle Regiment" of 1500 men, 1300 were killed, 35 wounded captured, and 130 took to the jungle where they died. The Marine Major's battalion had 24 killed and about 70 wounded. From this night battle of "Hell Point" he concludes:

> The annihilation of a unit of this calibre gave our men sureness and confidence. It showed us the enemy's limitations. The inexcusable loss of a unit like this was caused by the Japanese following orders blindly and mechanically. And our success was due largely to the capacity of the average American to fight intelligently on his own initiative without having to be told what to do. In this difference between types of fighting men, lies one of our great assets in the Pacific war.
>
> JOHN HOWLAND, '32, LL.B. '36
> Major, U. S. M. C.

In "Some Facts and Factors in the Japan of Today and Tomorrow," by Horace H. Underwood, President of Chosen Christian College in Korea, published in the Delta Upsilon Quarterly for July, 1943, (p. 182, at p. 184), the author says:

> "Like all Oriental peoples, the Japanese holds human life very cheap, his own as well as others. He is calloused to human suffering and for the nth time we remind you he is blindly obedient, ready to execute without thought or compunction any orders he may receive. He is also completely self-centered."

The Selective Service regulations provide that every form set up thereunder shall be a part thereof (Reg. Sec. 605.51), and regulations and forms are replete with directions and orders. If the failure to observe, answer and

obey all of these multifarious instructions, rules and orders is in every case to constitute a crime at the election of the System, punishable by the courts, the America of the future may be reduced to that abject state of blind obedience characteristic of Japan and other people accustomed to taking dictation from a government not responsible to them.

For the reasons herein given we pray the court to take jurisdiction, issue its writ of certiorari, and upon hearing on the merits reverse the judgment below.

Respectfully submitted,

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